(20,142.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 739.

ROBERT L. OWEN, PLAINTIFF IN ERROR,

vs.

WILLIAM W. DUDLEY AND LOUIS T. MICHENER, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF DUDLEY & MICHENER.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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In the Court of Appeals of the District of Columbia.

No. 1821.

WILLIAM W. DUDLEY ET AL., Appellants,
vs.
ROBERT L. OWEN.

a Supreme Court of the District of Columbia.

No. 48670. At Law.

WILLIAM W. DUDLEY and LOUIS T. MICHENER, Doing Business under the Firm Name and Style of Dudley & Michener, Plaintiffs,
vs.
ROBERT L. OWEN, Defendant.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:—

1 *Declaration, &c.*

Filed July 14, 1906.

In the Supreme Court of the District of Columbia.

No. 48670. At Law, Docket No. —.

WILLIAM W. DUDLEY and LOUIS T. MICHENER, Doing Business under the Firm Name and Style of Dudley & Michener, Plaintiffs,
vs.
ROBERT L. OWEN, Defendant.

The plaintiffs sue the defendant for money payable by the defendant to the plaintiffs for goods bargained and sold by the plaintiffs to the defendant; and for goods sold and delivered by the plaintiffs to the defendant; and for work done and materials provided by the plaintiffs for the defendant, at his request; and for money lent by

the plaintiffs to the defendant; and for money paid by the plaintiffs for the defendant at his request; and for money received by the defendant for use of the plaintiffs; and for money found to be due from the defendant to the plaintiffs on accounts stated between them.

And the plaintiffs claim $10,000.00 with interest at the rate of 6 per cent. per annum from the 14th day of July 1906.

Second Count.

2 And the said Plaintiffs by their said Attorneys for a second count to their said declaration, sue the said Robert L. Owen, for money payable by the said Robert L. Owen, to the Plaintiffs, for that heretofore to wit, on or about the 28th day of May A. D. 1902, the said Robert L. Owen and the said Plaintiffs by their contract under seal duly delivered and executed did promise and agree in words and figures following, to wit:

"This memorandum of agreement witnesseth: That John Vaile, Esq., of Fort Smith, Ark., having been employed by the Eastern Cherokee Council of the Cherokee Nation, Indian Territory, under contract of Feb. and April, 1900, and ratified a third time by Act of Council of Sept. 4, 1901;

And whereas, the said John Vaile has employed the services of Robert L. Owen of Muscoga, Indian Territory, under his aforesaid contract;

Now therefore, the premises considered, the said Owen hereby contracts and agrees to convey to W. W. Dudley and L. T. Michener, partners of the firm of Dudley & Michener, the sum of ten thousand dollars ($10,000) out of the fee so placed to the said Owen, immediately upon the collection, or in the exact proportion as the said fees may be collected, it being understood and agreed that this contract is conditioned upon the collection of the fees aforesaid. And in the contingency of the fees not being provided for by legislation, as per the contract of the Eastern Cherokee Council aforesaid,

3 but upon proof of services, then, and in that event, each of the parties hereto shall prove service independently of the other, and said Owen shall not be expected out of fees collected for his personal service, to pay the fees to the said Dudley & Michener, but it is understood and agreed that he will in such a contingency, do what he can to assist Dudley & Michener to collect the fee hereby contracted by them.

The said Dudley and Michener on their part agree to give their co-operation in the collection of the money due the Eastern Cherokees and to assist the said Owen as associate Counsel in this case.

Witness our hands and seals in duplicate on this 28th day of May, 1902.

(Signed) ROBERT L. OWEN. [SEAL.]
(Signed) DUDLEY & MICHENER. [SEAL.]"

And the Plaintiffs in fact say that, although they have faithfully kept, done, and performed each and everything by said writing on their part agreed to be kept, done and performed and although the said Robert L. Owen hath collected all the fees in said contract to be collected, the said Robert L. Owen hath failed hitherto and still doth fail to keep, carry out and perform the agreement on his part so to be kept, carried out and performed and especially and particularly hitherto hath failed to convey and pay to the Plaintiffs the said sum of ten thousand dollars ($10,000) to the great damage and injury of the Plaintiffs, wherefore they bring this suit and claim $10,000 with interest from this date, besides costs.

SAM'L A. PUTMAN,
CHAS. POE,
Attorneys for Plaintiffs.

4 The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof: otherwise judgment.

SAM'L A. PUTMAN,
CHAS. POE,
Attorneys for Plaintiff-.

Affidavit.

DISTRICT OF COLUMBIA, *To wit:*

William W. Dudley swears that he is one of the plaintiffs named in the declaration to which this affidavit is attached; that the plaintiffs' cause of action therein is based upon a contract under seal made and executed on May 28, 1902, by the plaintiffs and the defendant a true copy of which is hereto annexed and made a part hereof and that the plaintiffs have done everything on their part agreed to be done by the terms of said contract; that the defendant has collected the money mentioned in said contract in full as set forth, but hath failed to pay or convey to the plaintiffs the said sum of ten thousand dollars as the defendant agreed by the terms of said contract to pay and convey and that the sum of $10000.00 with interest, from this date as therein claimed, is justly due and owing to the plaintiffs from the defendant by reason of the premises, exclusive of all set-offs and just grounds of defense.

WILLIAM W. DUDLEY.

Subscribed and sworn to before me this 14th day of July, 1906.

[SEAL.] M. S. W. DAY,
Notary Public.

5 *Defendant's Plea.*

Filed October 1, 1906.

In the Supreme Court of the District of Columbia, the First Day of October, 1906.

No. 48670. At Law.

WILLIAM W. DUDLEY and LOUIS T. MICHENER, Doing Business under the Firm Name and Style of Dudley & Michener, Plaintiffs,
vs.
ROBERT L. OWEN, Defendant.

I. The defendant, for plea to the first count of the declaration, says that he did not promise in manner and form as therein alleged.

II. The defendant, for plea to the second count of the declaration, says that he did not promise in manner and form as therein alleged.

* * * * * * *

WM. H. ROBESON,
Attorney for Defendant.

Joinder of Issue.

Filed October 12, 1906.

In the Supreme Court of the District of Columbia.

No. 48670. At Law.

WILLIAM W. DUDLEY ET AL., Plaintiffs,
vs.
ROBERT L. OWEN, Defendant.

6 The plaintiffs hereby join issue with the defendant upon his plea to the first count of plaintiffs' declaration and upon his second plea to the second count of plaintiffs' declaration.

SAM'L A. PUTMAN,
CHAS. POE,
Attorneys for Plaintiffs.

Stipulation for Trial by the Court Without a Jury.

Filed May 22, 1907.

In the Supreme Court of the District of Columbia.

No. 48670. At Law.

WILLIAM W. DUDLEY ET AL., Plaintiffs,
vs.
ROBERT L. OWEN, Defendant.

It is hereby agreed by the parties to this suit that the issues of fact may be tried and determined by the court without the intervention of a jury and a jury in said trial is hereby waived, according to the terms and provisions of Sections 70 and 71 of the Code of the District of Columbia.

SAM'L A. PUTMAN,
CHAS. POE,
Attorneys for the Plaintiffs.
WM. H. ROBESON,
Attorney for the Defendant.

7 Supreme Court of the District of Columbia.

MONDAY, *July* 8, 1907.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * * *

At Law. No. 48670.

WILLIAM W. DUDLEY and LOUIS T. MICHENER, Doing Business under the Firm Name and Style of Dudley and Michener, Pl't'fs,
vs.
ROBERT L. OWEN, Def't.

Now again come here the parties aforesaid, in manner aforesaid: whereupon this cause having heretofore been heard by the Court, the Court finds the matters of difference between the parties in favor of the defendant.

Therefore it is considered that the plaintiffs take nothing by their suit, and that the defendant go thereof without day, and recover against the plaintiffs the costs of his defense, to be taxed by the Clerk and have execution thereof.

The plaintiffs note an appeal to the Court of Appeals of the District of Columbia, and upon motion, the penalty of the bond for costs upon said appeal is hereby fixed in the sum of one hundred dollars ($100).

8 *Memoranda.*

July 12, 1907.—Bill of exceptions submitted to court.
July 12, 1907.—Appeal bond filed.

Supreme Court of the District of Columbia.

SATURDAY, *July* 20, 1907.

Session resumed pursuant to adjournment, Mr. Justice Anderson presiding.

* * * * * * *

By Justice Wright.

At Law. No. 48670.

WILLIAM W. DUDLEY ET AL., Pl'ff's,
vs.
ROBERT L. OWEN, Def't.

Now come here the plaintiffs by their Attorneys and pray the Court to sign, seal and make part of the record, their bill of exceptions taken during the trial of this cause (heretofore submitted) now for then, which is accordingly done.

9 *Bill of Exceptions.*

Filed July 20, 1907.

In the Supreme Court of the District of Columbia.

No. 48670. At Law.

WILLIAM W. DUDLEY ET AL., Plaintiffs,
vs.
ROBERT L. OWEN, Defendant.

At the trial of this cause before Mr. Justice Wright without a jury, after the offer of testimony on behalf of the plaintiffs and defendant, the Court, at the request of the plaintiffs, found the following facts to have been proven:

On May 28, 1902, the plaintiffs and the defendant entered into the following contract:

This memorandum of agreement witnesses that John Vaile, Esquire, of Fort Smith, Arkansas, having been employed by the Eastern Cherokee Council of the Cherokee Nation, Indian Territory, under contract of February and April, 1900, and ratified a third time by act of Council of September 4th, 1901;

And whereas, the said John Vaile has employed the services of

Robert L. Owen, of Muscoga, Indian Territory, under his aforesaid contracts:

Now therefore, the premises considered, the said Owen hereby contracts and agrees to convey to W. W. Dudley and L. T.
10 Michener, partners, of the firm of Dudley & Michener, the . . sum of Ten Thousand Dollars ($10,000.00), out of the fees so pledged to the said Owen immediately upon the collection, or in the exact proportion as the said fees may be collected, it being understood and agreed that this contract is conditioned upon the collection of the fees aforesaid. And in the contingency of the said fees not being provided for by legislation, as per the contract of the Eastern Cherokee Council aforesaid, but upon proof of services, then and in that event, each of the parties hereto shall prove service independently of the other, and said Owen shall not be expected out of fees collected for his personal service, to pay the fee to said Dudley & Michener, but it is understood and agreed that he will in such a contingency do what he can to assist Dudley & Michener to collect the fee hereby contracted by them.

The said Dudley & Michener on their part agree to give their co-operation in the collection of the money due the Eastern Cherokees and to assist the said Owen as associate counsel in this case.

Witness our hands and seals in duplicate on this twenty-eighth day of May, 1902.

ROBERT L. OWEN. [SEAL.]
DUDLEY & MICHENER. [SEAL.]

Thereafter the plaintiffs, on their part, gave to the defendant their co-operation, assistance and services in the prosecution and
11 collection of the claim referred to in said contract, as said contract provided they should do.

On March 20, 1905, the Court of Claims rendered a judgment in the case of the Eastern Cherokees against the United States. On April 17, 1905, the defendant, Owen, addressed the following letter to the plaintiffs:

"THE SOUTHERN,
ST. LOUIS, *April* 17, 1905.

Dudley & Michener, Washington, D. C.

GENTLEMEN: I expect to be at Riggs House about April 28th, 1905, and wish by that time you would make up a careful affidavit of services rendered in case under contract of May 28/02, as I am preparing decree and wish to protect your fee.

Yours truly, R. L. OWEN."

A few days thereafter, the plaintiff, Michener, met the defendant, and was told by him that he had abandoned the purpose to make application for fees at that time and would postpone said application until after the Supreme Court of the United States, to which the said case was to be appealed, had acted thereon, and the application was so postponed by the defendant Owen. The judgment of the Court of Claims was affirmed by the Supreme Court, with a slight modification. After the return of the mandate of the Su-

preme Court to the Court of Claims, the defendant, Owen,
12 who was one of the attorneys of record in the case in the Court of Claims, together with his co-attorney of record, R. V. Belt, made an application to the Court of Claims for the allowance of 15 per cent. of the judgment to them as their fee. By agreement between the said Owen and Belt and certain of their associate attorneys, other than the plaintiffs, and without notice from defendant to the plaintiffs, the Court apportioned the fee of 15 per cent. among said Owen and Belt and those associate attorneys, in accordance with their several contracts.

Under the rules of the Court of Claims the attorneys of record had absolute control of the distribution of the fee allowed by the Court, and the Court, not recognizing any associate counsel, save as directed by the attorneys of record, the plaintiffs could not, under the rules of the Court, have claimed any fee except by permission of the said attorneys of record.

Under said decree the defendant, Owen, was allowed and was paid the full amount of fees contemplated to be received by him according to the terms of the said contract between him and Dudley & Michener.

The plaintiffs were not parties to the said agreement between Owen and Belt, as attorneys of record, and said associate counsel, and had no further notice from Owen that any application was to be made to the Court to apportion fees to any counsel except attorneys of record, nor were they ever further notified by the defendant to prepare and render proof of their services after the interview between the plaintiff Michener and the defendant, in April, 1905.

The defendant has never paid to the plaintiffs any sum on
13 account of the said contract between him and plaintiffs.

Whereupon the plaintiffs prayed the Court to find the following conclusions of law:

The plaintiffs request the Court to find as a matter of law that under the pleadings and evidence in this case, it was not incumbent upon the plaintiffs to make proof of services in the Court of Claims to entitle them to recover.

The plaintiffs request the Court to render a judgment in favor of them on the pleadings and all the evidence in the cause, for the sum of Ten Thousand Dollars ($10,000.00), with interest from July 14, 1906.

Which conclusion of law the Court refused to find; to which action of the Court in refusing to find each of said conclusions of law the plaintiffs then and there excepted, and the judgment of the Court being against the plaintiffs, and in favor of the defendant, the plaintiffs have prayed an appeal to the Court of Appeals of the District of Columbia, which hath been allowed, and in order that the matters and things in their Bill of Exceptions which otherwise would not appear of record, may be so made to appear and that it may be known that the above findings are all the facts in this cause, said plaintiffs prayed the Court to sign this their Bill of Exceptions, which is accordingly done and made of record, this 20th day of July, A. D. 1907, now for then.

DAN THEW WRIGHT, *Justice.* [SEAL.]

14 *Instructions for Preparation of Record on Appeal.*

Filed July 20, 1907.

At Law. No. 48670.

W. W. DUDLEY ET AL.
vs.
R. L. OWEN.

John R. Young, Esquire, Clerk, &c., &c.

SIR: In making up the Record on Appeal to the Court of Appeals of the District of Columbia you will include the following papers, The Declaration—The pleas to which the demurrer was not interposed—The replication—The stipulation for trial by the Court—Bill of Exceptions—The judgment—The prayer for appeal and order allowing the same and the memorandum as to filing of approved appeal bond—

SAM'L A. PUTMAN,
CHAS. POE,
Att'ys for Pl't'fs.

15 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 14, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 48670 at law, wherein William W. Dudley, *et al.* are Plaintiffs and Robert L. Owen is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 7th day of August, A. D. 1907.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk,*
By ALF. G. BUHRMAN,
Ass't Clerk.

Endorsed on cover: District of Columbia supreme court. No. 1821. William W. Dudley *et al.*, appellants, *vs.* Robert L. Owen. Court of Appeals, District of Columbia. Filed Aug. 12, 1907. Henry W. Hodges, clerk.

TUESDAY, *February* 18*th*, *A. D.* 1908.

No. 1821.

WILLIAM W. DUDLEY and LOUIS T. MICHENER, Doing Business under the Firm Name and Style of Dudley & Michener, Appellants,

vs.

ROBERT L. OWEN.

The argument in the above entitled cause was commenced by Mr. Charles Poe, attorney for the appellants.

WEDNESDAY, *February* [illegible]*h*, *A. D.* 1908.

No. 1821.

WILLIAM W. DUDLEY and LOUIS T. MICHENER, Doing Business under the Firm Name and Style of Dudley & Michener, Appellants,

vs.

ROBERT L. OWEN.

The argument in the above entitled cause was continued by Mr. W. H. Robeson, attorney for the appellee, and was concluded by Mr. S. A. Putman, attorney for the appellants.

No. 1821.

WILLIAM W. DUDLEY and LOUIS T. MICHENER, Appellants,

vs.

ROBERT L. OWEN.

Opinion.

(Mr. Justice ROBB delivered the opinion of the Court:)

Appellants as plaintiffs below sued to recover the sum of $10,000 and interest. By stipulation of counsel the case was heard before the court without a jury agreeably to the provisions of sections 70 and 71 of the Code. The following facts were found to have been proven:

"On May 28, 1902, the plaintiffs and the defendant entered into the following contract:

This memorandum of agreement witnesseth that John Vaile, Esquire, of Fort Smith, Arkansas, having been employed by the Eastern Cherokee Council of the Cherokee Nation, Indian Territory, under contract of February and April, 1900, and ratified a third time by act of council of September 4th, 1901;

And whereas, the said John Vaile has employed the services of Robert L. Owen, of Muscoga, Indian Territory, under his aforesaid contracts:

Now therefore the premises considered, the said Owen hereby contracts and agrees to convey to W. W. Dudley and L. T. Michener, partners, of the firm of Dudley and Michener, the sum of Ten Thousand Dollars ($10,000.00), out of the fees so pledged to the said Owen immediately upon the collection, or in the exact proportion as the said fees may be collected, it being understood and agreed that this contract is conditioned upon the collection of the fees aforesaid. And in the contingency of the said fees not being provided for by legislation, as per the contract of the Eastern Cherokee Council aforesaid, but upon proof of services, then and in that event, each of the parties hereto shall prove service independently of the other, and said Owen shall not be expected out of fees collected for his personal service, to pay the fee to said Dudley & Michener, but it is understood and agreed that he will in such a contingency do what he can to assist Dudley & Michener to collect the fee hereby contracted by them.

The said Dudley & Michener on their part agree to give their co-operation in the collection of the money due the Eastern Cherokees and to assist the said Owen as associate counsel in this case.

Witness our hands and seals in duplicate on this twenty-eighth day of May, 1902.

ROBERT L. OWEN. [SEAL.]
DUDLEY & MICHENER. [SEAL.]

Thereafter the plaintiffs, on their part, gave to the defendant their co-operation, assistance and services in the prosecution and collection of the claim referred to in said contract, as said contract provided they should do.

On March 20, 1905, the Court of Claims rendered a judgment in the case of the Eastern Cherokees against the United States. On April 17, 1905, the defendant, Owen, addressed the following letter to the plaintiffs:

'THE SOUTHERN,
ST. LOUIS, *April* 17, 1905.

Dudley & Michener, Washington, D. C.

GENTLEMEN: I expect to be at Riggs House about April 28th, 1905, and wish by that time you would make up a careful affidavit of services rendered in case under contract of May 28/02, as I am preparing decree and wish to protect your fee.

Yours truly, R. L. OWEN.'

A few days thereafter, the plaintiff, Michener, met the defendant, and was told by him that he had abandoned the purpose to make application for fees at that time and would postpone said application until after the Supreme Court of the United States, to which the said case was to be appealed, had acted thereon, and the application was so postponed by the defendant Owen. The judgment of the Court of Claims was affirmed by the Supreme Court, with a slight modification. After the return of the mandate of the Supreme Court to the Court of Claims, the defendant, Owen, who was one of the attorneys of record in the case in the Court of Claims, together with

his co-attorney of record, R. V. Belt, made an application to the Court of Claims for the allowance of 15 per cent. of the judgment to them as their fee. By agreement between the said Owen and Belt and certain of their associate attorneys, other than the plaintiffs, and without notice from defendant to the plaintiffs, the Court apportioned the fee of 15 per cent. among said Owen and Belt and those associate attorneys, in accordance with their several contracts.

Under the rules of the Court of Claims the attorneys of record had absolute control of the distribution of the fee allowed by the Court, and the Court, not recognizing any associate counsel, save as directed by the attorneys of record, the plaintiffs could not, under the rules of the court, have claimed any fee except by permission of the said attorneys of record.

Under said decree the defendant, Owen, was allowed and was paid the full amount of fees contemplated to be received by him according to the terms of the said contract between him and Dudley & Michener.

The plaintiffs were not parties to the said agreement between Owen and Belt, as attorneys of record, and said associate counsel, and had no further notice from Owen that any application was to be made to the Court to apportion fees to any counsel except attorneys of record, nor were they ever further notified by the defendant to prepare and render proof of their services after the interview between the plaintiff Michener and the defendant, in April, 1905.

The defendant has never paid to the plaintiffs any sum on account of the said contract between him and plaintiffs."

Thereupon plaintiffs requested the Court to render a judgment in their favor, which the Court declined to do, but, on the contrary, found for the defendant.

Did the Court err in its interpretation of this contract, is the question here presented?

When the contract forming the basis of this action was signed (May 28, 1902), it was evidently in the minds of the parties that the provisions of sections 2103 to 2106, both inclusive, of the Revised Statutes of the United States would, in the absence of further legislation, govern the payment of Mr. Owen's fees under the John Vaile contract. In section 2104 it is provided that no money shall be paid to any person for services to any Indian, Indians, or Indian Tribe, under any contract or agreement "until such person shall have first filed with the Commissioner of Indian Affairs a sworn statement, showing each particular act of service under the contract, giving date and fact in detail, and the Secretary of the Interior and Commissioner of Indian Affairs shall determine therefrom, whether, in their judgment, such contract or agreement has been complied with or fulfilled; if so, the sum may be paid, and, if not, it shall be paid in proportion to the service rendered under the contract."

By section 68 of the Act of Congress of July 1, 1902, (32 Stat. L., pt. 1, 726), Congress conferred jurisdiction upon the Court of Claims to hear and determine any claim, which the Cherokee Tribe or any band thereof, arising under treaty stipulation, might have against the United States. The section further provided that any suit brought under the Act should "be through attorneys employed

and *to be compensated in the manner prescribed in sections twenty-one hundred and three to twenty-one hundred and six, both inclusive, of the Revised Statutes of the United States.*" If further evidence were necessary to convince us that the contract between the parties herein was made with reference to the provisions of the Revised Statutes above referred to, it is to be found in the provisions in the Act of March 3, 1903 (32 Stat. L., pt. 1, 996), specifically fixing the status of "the Eastern Cherokees, so called, including those in the Cherokee Nation," etc., as a band or bands for all purposes of said section 68 of said act of July 1, 1902, and ordaining "that the prosecution of such suit on the part of the Eastern Cherokees shall be through attorneys employed by their proper authorities, their compensation for expenses and services rendered in relation to such claim to be fixed by the Court of Claims upon the termination of such suit."

If these various provisions are kept in mind the interpretation of the contract becomes much easier since they tend to explain its ambiguities and shed light on what originally was in the minds of the parties. Mr. Owen's contract contemplated that he should receive fifteen per cent. of the amount collected. The Court finds that the full amount was allowed him. Appellants were to receive $10,000 out of the fees so pledged to said Owen or a proportionate amount if Owen failed to collect the entire amount of his fee. Thus far the contract is free from ambiguity. Owen's success measured appellants' success, and his failure meant their failure. Now comes the provision that "in the contingency of said fees (Owen's) not being provided for by legislation * * * but upon proof of services," each party shall look out for himself; Owen, however, "in such a contingency to do what he can to assist" appellants to collect their fee. What was meant by this provision? Unless additional legislation could be secured, Owen feared he might be compelled to file with the Commissioner of Indian Affairs "a sworn statement, showing each particular act of service" under his contract, "giving date and fact in detail," and that he might then be compelled to convince the Secretary of the Interior and the Commissioner of Indian Affairs that the whole of the large amount claimed by him should be paid. It was but natural that he should have stipulated that in such a contingency he would not pay appellants "out of the fees collected for his *personal* service," that is, out of the fees allowed him under his sworn itemized detailed statement to the Commissioner of Indian Affairs. Said section 68 of said Act of July 1, 1902, confirmed the fear entertained by Owen at the time the contract with appellants was entered into, since that Act specifically made applicable the above provision of the Revised Statutes. But, said Act of March 3, 1903, contained the legislation contemplated by Owen's contract with appellants. Under that Act, instead of being compelled to show "each particular act of service" under his contract, he could go before a court and receive compensation upon a much more liberal basis. Instead of being paid by the day he would be paid by results—the measure of his success for his clients would proportionally be the measure of his fee. Surely it was never contemplated by either Owen or appellants that Congress would

directly fix the fee Owen was to receive. All that in reason could have been contemplated was that legislation might be enacted similar to that which was enacted. If the legislation, under which he received his fee, did not come within the letter of the contract, it certainly came within its spirit and hence was within the contract.

The letter of April 17, 1905, from Owen to appellants, if considered in connection with what followed, adds cogency to the above views. When he wrote the letter, Owen evidently thought it might be well to be prepared to supplement his statement as to services rendered by the affidavit of appellants. Within a few days, however, he met one of appellants and informed him that he (Owen) would postpone making application for fees until a later date.

We next find him and his co-attorney of record, Belt, before the Court of Claims where "by agreement between the said Owen and Belt and certain of their associate attorneys, other than the plaintiffs, the Court apportioned the fee of 15 per cent. among said Owen and Belt *and those associate attorneys, in accordance with their several contracts.*" Unless we are to impute bad faith to Mr. Owen, we must find that after writing appellants he concluded it would not be necessary for them to make any affidavit for his use before the Court of Claims; hence his failure to notify them. That his judgment was correct is evidenced by the allowance of his whole fee of fifteen per cent. That appellants so interpreted the contract is manifest, as otherwise they would not have rested in supposed security while their fee was being frittered away. The affidavit mentioned in Owen's letter was not the affidavit required by the Revised Statutes, but simply an affidavit for Owen's use, which, as we have said, he subsequently determined it was not necessary to have.

Appellants have rendered Owen the services they agreed to render, and he has reaped the benefit. He was to pay them out of his fees unless he should be compelled to collect his fees under existing law. The legislation hoped for and contemplated by the contract was enacted, and upon the allowance of Owen's fees, we think it was incumbent upon him to pay appellants.

The judgment must be reversed, with costs, and the case remanded with directions to enter a judgment for the plaintiffs for $10,000 with interest from July 14, 1906, the date of the inception of this action.

Reversed.

TUESDAY, *April 7th, A. D.* 1908.

No. 1821, April Term 1908.

WILLIAM W. DUDLEY and LOUIS T. MICHENER, Doing Business under the Firm Name and Style of Dudley & Michener, Appellants,

vs.

ROBERT L. OWEN.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued

by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby remanded to the said Supreme Court with directions to enter a judgment for the plaintiffs for $10,000 with interest from July 14, 1906, the date of the inception of this action.

Per MR. JUSTICE ROBB,
April 7, 1908.

TUESDAY, *April* 14*th*, *A. D.* 1908.

No. 1821.

WILLIAM W. DUDLEY and LOUIS T. MICHENER, Doing Business under the Firm Name and Style of Dudley & Michener, Appellants,

vs.

ROBERT L. OWEN.

On motion of Mr. W. H. Robeson, attorney for the appellee, It is ordered by the Court that a writ of error to remove this cause to the Supreme Court of the United States issue, and the bond to act as supersedeas is fixed at the sum of thirteen thousand dollars.

UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between William W. Dudley and Louis T. Michener, doing business under the firm name and style of Dudley & Michener, Appellants, and Robert L. Owen, Appellee, a manifest error hath happened, to the great damage of the said Appellee as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States, the 14th day of April, in the year of our Lord one thousand nine hundred and eight.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

——— ———,

——— ———.

(*Bond on Writ of Error.*)

Know all men by these presents, that we, Robert L. Owen, as principal, and Fidelity and Deposit Company of Maryland, a corporation, of Baltimore City, Maryland, as surety, are held and firmly bound unto William W. Dudley and Louis T. Michener in the full and just sum of Thirteen thousand dollars, to be paid to the said William W. Dudley and Louis T. Michener, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 21st day of April, in the year of our Lord one thousand nine hundred and eight.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between William W. Dudley and Louis T. Michener, doing business under the firm name and style of Dudley & Michener, appellants, and Robert L. Owen, appellee, a judgment was rendered against the said Robert L. Owen and the said Robert L. Owen having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said William W. Dudley and Louis T. Michener citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said Robert L. Owen shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

ROBERT LATHAM OWEN. [SEAL.]
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By W. H. RONSAVILLE, *Attorney-in-Fact.*

[Seal of Fidelity and Deposit Company of Maryland.]

Sealed and delivered in the presence of—
A. M. RAWLINGS,
V. W. LANHAM,
Witness to R. L. O.

Approved by—
SETH SHEPARD,
Chief Justice Court of Appeals of the District of Columbia.

[Endorsed:] No. 1821. William W. Dudley *et al.*, &c., Appellants, *vs.* Robert L. Owen. Supersedeas Bond on Writ of Error to S. C. U. S. Court of Appeals, District of Columbia. Filed Apr. 22, 1908. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, *ss:*

To William W. Dudley and Louis T. Michener, doing business under the firm name and style of Dudley & Michener, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Robert L. Owen is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 22nd day of April, in the year of our Lord one thousand nine hundred and eight.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted April 23, 1908.

SAM'L A. PUTMAN,
Counsel for Defendants in Error.

[Endorsed:] Court of Appeals, District of Columbia. Filed Apr. 23, 1908. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 21, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of William W. Dudley and Louis T. Michener, doing business under the firm name and style of Dudley & Michener, Appellants, *vs.* Robert L. Owen, No. 1821, April Term, 1908, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 25th day of April A. D. 1908.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 21,142. District of Columbia Court of Appeals. Term No. 739. Robert L. Owen, plaintiff in error, *vs.* William W. Dudley and Louis T. Michener, doing business under the firm-name and style of Dudley & Michener. Filed April 28th, 1908 File No. 21,142.

IN THE

Supreme Court of the United States

October Term, 1906.

No. 162.

ROBERT L. OWEN, *Plaintiff in Error*,

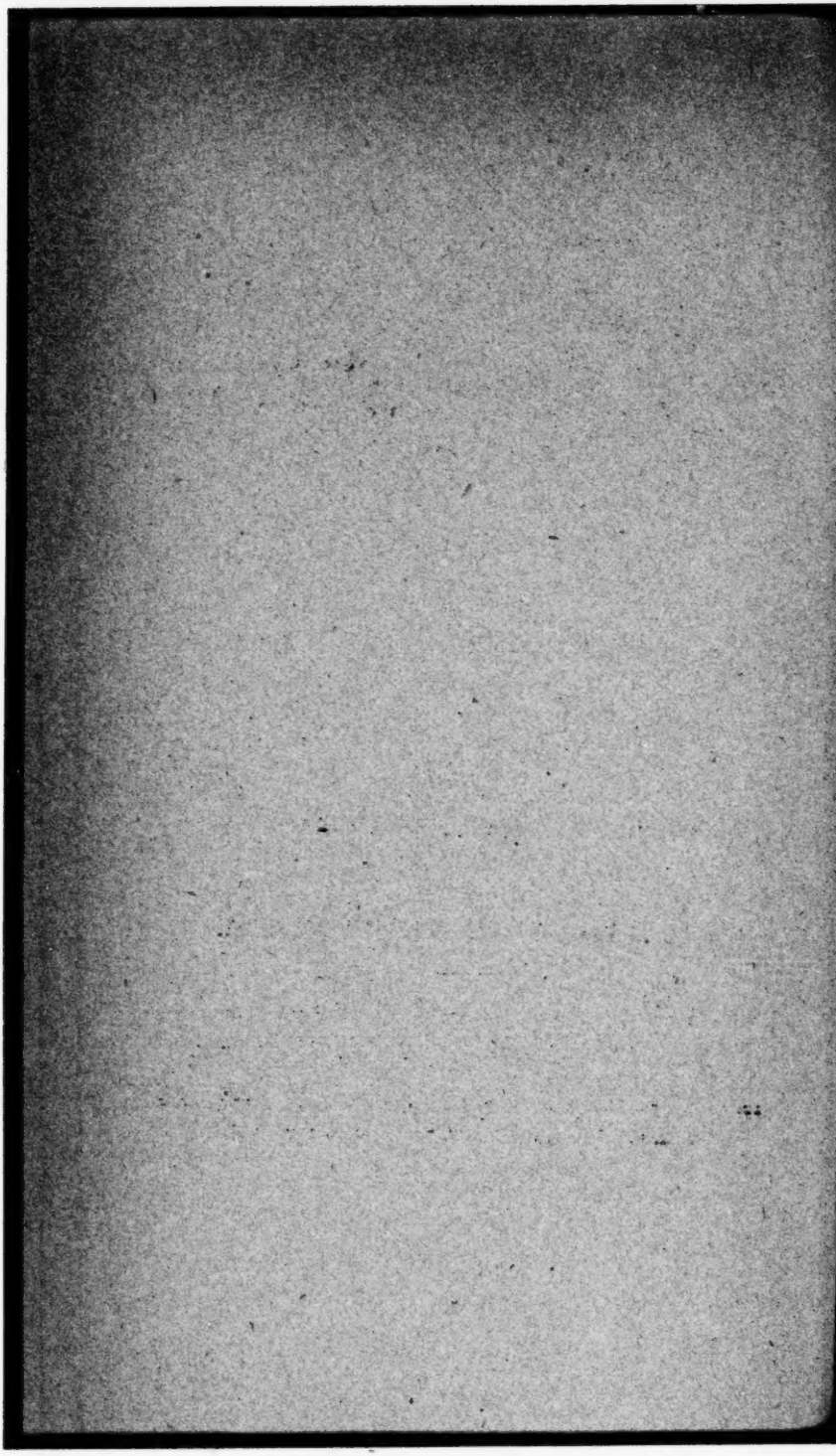
vs.

WILLIAM W. DUDLEY AND LOUIS T. MICHENER, doing business under the firm name of DUDLEY & MICHENER, *Defendants in Error*.

BRIEF FOR PLAINTIFF IN ERROR.

WILLIAM H. ROBESON,
Attorney for Plaintiff in Error.

WALLACE & CADICK, PRINTERS, WASHINGTON, D. C.



Supreme Court of the United States.

October Term, 1909.

No. 142.

ROBERT L. OWEN, *Plaintiff in Error,*

vs.

WILLIAM W. DUDLEY AND LOUIS T. MICHENER, doing business under the firm name of DUDLEY & MICHENER, *Defendants in Error.*

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Pleadings.

This suit was brought upon a certain contract between the parties litigant, which averred the existence of a contract made between the plaintiff in error and one John Vaile, whereby the latter employed plaintiff in error Owen to prosecute a certain claim of the Eastern Cherokees against the United States, and which, providing for the co-operation of defend-

ants in error in the collection of the claim and their assistance as associate counsel stipulated for a fee for the defendants in error of ten thousand dollars ($10,000), out of the fee pledged to plaintiff in error by the said John Vaile, "or in the exact proportion as said fees may be collected," the payment of the fee to defendants in error being contingent upon the collection by the plaintiff in error of his fee.

For convenience of consideration, and with the permission of the court, counsel, instead of using the terms plaintiff in error and defendants in error, will give the names of the parties—Robert L. Owen, being plaintiff in error, and Dudley & Michener, being defendants in error.

The contract between these parties further stipulates that if the fee should not be "provided for by legislation," but should be "collected on proof of services," the parties to the contract should "prove services independently of each other"; and there was a further condition that in the event of the necessity of proving service, Owen was "not to be expected out of fees collected for his personal services to pay the fee of the said Dudley & Michener." (Rec., p. 2.)

The case was heard in the Supreme Court of the District of Columbia without a jury (Rec., p. 5); certain findings of fact made by the Court (Rec., pp. 6, 7 and 8); and judgment awarded for the defend-

ant, Robert L. Owen (Rec., p. 8). From this judgment of the Supreme Court of the District of Columbia an appeal was prayed to the Court of Appeals of the District of Columbia (Rec., p. 5), which reversed the judgment of the inferior court and awarded judgment in favor of Dudley & Michener in the sum of ten thousand dollars ($10.000) (Rec., pp. 14 and 15); whereupon the cause was brought to this Honorable Court by writ of error.

Statement of the Case.

On May 28, 1902, Robert L. Owen entered into a contract with Dudley & Michener, by which the latter firm was to receive a fee of ten thousand dollars ($10,000) by reason of association with the said Owen in the prosecution of a certain claim of the Eastern Cherokees against the United States. This contract recited that John Vaile had been employed by the Eastern Cherokee Council of the Cherokee Indians to prosecute the claim; that Vaile had employed Owen under his said contract and that Owen was to pay Dudley & Michener ten thousand dollars ($10,000) out of the fee Vaile had contracted to pay him. The contract further recited that if the fees contemplated by the contract between Vaile and the Eastern Cherokee Council should not be "provided by legislation," but should be secured upon "proof of services, then and in that event, each of the parties hereto shall prove service independently

of the other, and said Owen shall not be expected, out of the fees collected for his personal services, to pay the fees to the said Dudley & Michener" (Rec., p. 2).

The defence to the suit is that the fee awarded Owen was not collected through John Vaile at all, nor under the contract with Vaile, nor was it "provided by legislation," but it was collected upon "proof of service," made before the Court of Claims in accordance with the Act of Congress conferring jurisdiction upon that court, the pertinent part of which is in these words:

> That the prosecution of such suit upon the part of the Eastern Cherokees shall be through attorneys employed by their proper authorities, and their compensation for expense and services rendered in relation to such claim to be fixed by the Court of Claims upon the termination of such suit; (32 Stat. L., Part 1, page 996)

that Dudley & Michener did not offer to prove service as they had bound themselves to do, and that they could not, therefore, have any fee for themselves out of Owen's fee.

Specifications of Error.

The Court of Appeals was in error—

1. In holding that the proof of service contemplated by the contract was proof to be made before the Commissioner of Indian Affairs.

2. In not holding that the proof of service was the proof which was to be made before the Court of Claims.

3. In holding Owen liable to pay the fee to Dudley & Michener, the payment of which, in any contingency, was based on the validity of the Vaile contract, and the collection of fees thereunder.

4. In not holding that Dudley & Michener must have made proof of service independently of Owen, and that failing to do so, they were not entitled to judgment against him.

5. In not holding that the necessity for proof of service released Owen from the obligation to pay a fee to Dudley & Michener.

6. In not holding that Owen's fee was not subject to be reduced for the purpose of the payment of any fee to Dudley & Michener.

7. In not holding that the failure of Congress to provide for the payment of the fees of attorneys, released Owen from any obligation to Dudley & Michener.

8. In not confirming the judgment of the Supreme Court of the District of Columbia.

Brief of Argument.

All the specifications of error, except the first one, may be considered together as presenting the question whether Owen can be liable to account to Dudley & Michener for a fee.

The contract provides that Dudley & Michener shall have no claim against Owen if proof of service should become necessary.

The Court of Appeals in its opinion referred to proof of service made under Sections 2103 to 2106 of the Revised Statutes of the United States. The particular Section is 2104. It is in these words:

> No money shall be paid to any agent or attorney by an officer of the United States under any such contract or agreement, other than the fees due him for services rendered thereunder; but the moneys due the Tribe, Indian, or Indians, as the case may be, shall be paid by the United States, through its own officers or agents, to the party or parties entitled thereto; and no money or thing shall be paid to any person for services under such contract or agreement, until such persons shall have first filed with the Commissioner of Indian Affairs a sworn statement, showing each particular act of service under the contract, giving date and fact in detail, and the Secretary of the Interior and Commissioner of Indian Affairs shall determine therefrom whether, in their judgment, such contract or agreement has been complied with or fulfilled; if so, the same may be paid, and, if not, it shall be paid in proportion to the services rendered under the contract. (R. S. 2104.)

That this proof of service was not contemplated in the contract between Owen and Dudley & Michener is obvious from the fact that on the third day of March, 1901 (31 Stat., 1073), more than a year before Owen and Dudley & Michener made their contract, every Indian in the Indian Territory was declared to be a citizen of the United States, and the contract was therefore not subject to the provisions of this statute.

The claim of the Eastern Cherokees against the United States was first referred to the Court of Claims under the provisions of the Tucker Act. Under that Act the Court could make only findings of fact. Congress might have made an appropriation in accordance with the findings of fact and might have provided for the fee of the attorneys who represented the Eastern Cherokees. If it had done so, Owen would have been obligated to pay to Dudley & Michener ten thousand dollars ($10,000). But Congress did nothing of the kind.

The Court of Appeals says in its opinion that:

> When the contract forming the basis of this action was signed (May 28, 1902) it was evidently in the mind of the parties that the provisions of Sections 2103 to 2106, both inclusive, of the Revised Statutes of the United States would, in the absence of further legislation, govern the payment of Mr. Owen's fee under the John Vaile contract.

Therein lies the Court's chief error. The Eastern Cherokee Indians on May 28, 1902, were citizens of the United States, and were not subject to the provisions of this law. They had the same right to contract as any other citizens of the United States, and were not subject in the matter of their contracts to the approval of the Commissioner of Indian Affairs, or any other government official. It cannot be, therefore, that Owen and Dudley & Michener had in contemplation the proof of service prescribed by Section 2104.

The other specifications of error, considered together, present the question whether Owen can be liable to account to Dudley & Michener for the compensation they claim.

The contract provided a fee of ten thousand dollars ($10,000) to be paid to Dudley & Michener out of the fee to be awarded to Owen for his services rendered to the Eastern Cherokees in the prosecution of their claim against the United States. That claim was the subject of consideration by this Honorable Court which awarded its judgment on the 26th day of May, 1906 (202 U. S., p. 101).

The contract recited that if the fee which Owen was to receive from John Vaile, who had employed him, was provided by legislation, he, Owen, would pay to Dudley & Michener ten thousand dollars ($10,000). But if the fee was not provided by legisation, and if, on the contrary, it became necessary

to prove service, in order to secure a fee, Dudley & Michener were to proceed independently of Owen to prove their services, if they had rendered any, and that no part of the fee recovered on proof of service by Owen should be taken to pay the fee contracted to Dudley & Michener.

The fee was not provided by legislation but, as we have shown, was awarded by the Court of Claims in accordance with the Statutes of the United States, upon proof of service. Owen proved service, and was awarded a fee. Dudley & Michener did not prove service and were not awarded a fee. Therefore, the simple question is presented, whether, it having been necessary to prove service, and Dudley & Michener having failed to prove service, as they had agreed to do, they can now come, and recover a fee from Owen with whom they had specifically contracted that no part of his fee should be taken to pay the fee claimed by them. The record precludes any inquiry into the question of the character or extent of Dudley & Michener's services under the contract sued upon. The fees were not provided for by legislation, but Congress, as we have stated, directed the Court of Claims to fix the fees of attorneys for the Eastern Cherokees. This the Court did, upon proof of service (Rec., p. 8).

At this point we desire to call the attention of the Court to the alleged finding of fact made by the

inferior court and commented upon by the Court of Appeals to the effect that under the rules of the Court of Claims the attorneys of record had absolute control of the disposition of the fee allowed by the court; and the court not recognizing any associate counsel, save as directed by the attorneys of record, the plaintiffs could not, under the rules of the court, have claimed any fee except by permission of the attorney of record. We have referred to this as an "alleged" finding of fact. It is not a finding of fact. It is a finding of law; and it is an incorrect finding of law. This Honorable Court can determine, notwithstanding this finding, whether the Court of Claims has the right to disregard the applications of attorneys, who are not the attorneys of record.

The Court of Claims cannot make valid rules which would prevent the consideration of the application of attorneys who are not attorneys of record. It has the right, under the law, to consider the claims of any attorneys. Therefore, it cannot be said that Dudley & Michener could not have made an application for fees to the Court of Claims.

As explanatory of the contract of Owen and Dudley & Michener, it was added in the contract (in contemplation of the refusal of the National Legislature to provide the fee) that the fee allowed to Owen for his service should not be subject to any demand by Dudley & Michener. If

that meant anything, it meant assuredly that Dudley & Michener could not expect to ride upon Owen's shoulders and secure a fee for services Owen had rendered. And it surely meant that Dudley & Michener must prove independently of him the services they had rendered to the Eastern Cherokees, and must show that they had rendered actual services in the collection of the claim, which would entitle them to receive a fee, the amount of which the Court of Claims was, under the law, to fix. And, inasmuch as Congress conferred upon the Court of Claims alone, the jurisdiction and authority to fix the fees of counsel, it was in that Court, and to that that Court, that the proof of service was to be made.

This Honorable Court knows from its own records that the judgment awarded in this case was for a very considerable sum; it knows that this sum was by its decree to be distributed among the descendants of persons who were members of the Eastern Cherokee Tribe in 1835 and 1846; it knows that such disbursement could not have been made immediately. This suit was brought upon the moment of the payment of the fee to Owen. Dudley & Michener could have filed a petition for their fees after the award of the fee to Owen. For aught we know they could bring suit now. They have chosen instead, to bring suit against Owen, notwithstanding their agreement to prove their own services and not to

hold Owen to liability for the payment of any part of their fee out of the fee awarded to him.

In this suit, for the first time, Dudley & Michener assert that they have rendered service in the prosecution of the claim of the Eastern Cherokees. If they had proved service they doubtless would have been awarded a fee in proportion to the services rendered. That fee might have been more, it might have been less, than appellant had contracted to pay them in contemplation of an appropriation by Congress.

In the absence of a finding by the Court as to the extent of Dudley & Michener's service we may not form an opinion as to the fee they would have been awarded if they had applied for one, nor are we permitted to speculate. It is certainly true that upon proof of service the Court of Claims might have awarded Dudley & Michener a fee less than ten thousand dollars ($10,000). As by compliance with the letter and spirit of the contract, such a result might have followed, it would seem that this judgment of the Court of Appeals, if confirmed, would give Dudley & Michener more than the Court of Claims might have allowed, and that the decision thereby offers an inducement to one holding such a contract to refuse to comply with its terms.

Against just such a result Owen stipulated in the contract; for, although its meaning on the point is

plain, although Owen was assured of being released from the obligation of the contract if the fee was "not provided for by legislation," and at the same time had reasonable assurance of services from Dudley & Michener, he made assurance double sure by providing that if in the event it became necessary to prove service, no part of his own fee was to be taken to pay the fee of Dudley & Michener, whether that fee should prove to be greater or less, than the amount he was to pay to Dudley & Michener if the fee was "provided for by legislation."

Let us suppose that Dudley & Michener had complied with the law and proved service, and the Court of Claims, upon such proof, had awarded them fifteen thousand dollars ($15,000)—surely Owen could not have complained. Let us suppose that the Court had allowed them but five thousand dollars upon their proof of service; is it possible that Dudley & Michener could have recovered five thousand dollars additional from Owen, when the court had fixed their fee and when Owen's fee was to be secure against any demand on their part? In either event the value of the services as expressed in the award of a fee was to be determined by the Court of Claims; and there was no prohibition against the allowance of a greater fee as there was no assurance against allowance of a smaller one. Yet, this decision accomplishes the fixing of a

fee against Owen of ten thousand dollars ($10,000) when no proof of any service is made, and makes it payable out of Owen's fee despite the positive agreement to the contrary. Congress passed the law which gave the power and authority to the Court of Claims to fix the fee. Congress *could* have provided the fee by legislation, but it chose not to do so. And when it gave the authority to the Court of Claims to fix the fee it then became the duty of Dudley & Michener to prove their service in that Court and to ask compensation therefor. In this they totally failed. That Act of Congress was the law—which every one is presumed to know. The presumption becomes intense since Dudley & Michener are lawyers. They do not pretend to ignorance, deception or fraud. It seems strange indeed that with a contract worth ten thousand dollars ($10,000), if Congress had provided a fee, Dudley & Michener did not deem it worth their while to prove service before the Court which they knew had the authority to estimate the value of those services and allow a fee.

Surely activity on the part of Dudley & Michener in making proof of their services was essential under their contract; and surely Owen is entitled to the benefit of his precaution in the provision that he should receive, in such event, whatever fee was allowed to him, without deduction therefrom for the

purpose of paying any fee to Dudley & Michener—whether they proved more or less of service than was contemplated in their contract.

For these reasons the judgment of the Court of Appeals in reversing the court of original jurisdiction was wrong, and it should be reversed.

WILLIAM H. ROBESON,
Attorney for Plaintiff in Error.